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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 288. 75.

THE OSHKOSH WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF OSHKOSH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED APRIL 3, 1901.

(18,101.)

9650

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1901.

[Reform spelling intended.]

1 To the Honorabl J. B. Cassoday, chief justice of the supreme court, State of Wisconsin:

Your petitioner, The Oshkosh Water Works Company, respectfuly states that—

In a suit between your petitioner, The Oshkosh Water Works Company, plaintif and appellant, and The City of Oshkosh, defendant and respondent, then pending upon apeal in the supreme court of the State of Wisconsin, being the highest court of the said State in which a decision coud be had in such suit, on the 26th day of February, 1901, a final judgment was renderd in favor of the said defendant and respondent, The City of Oshkosh, agenst your petitioner, The Oshkosh Water Works Company, plaintif and appellant, amung other things afirming the judgment of the Winnebago county circuit court, the trial court below, which judgment of the said Winnebago county circuit court, trial court below, was renderd on the 16th day of June, 1900, and dismist the complaint of the plaintif in the action then pending in said court wherein your petitioner, The Oshkosh Water Works Company, was plaintif and The City of Oshkosh was defendant, and ajudging that the defendant, The City of Oshkosh, do hav and recuver of and from the plaintif, The Oshkosh Water Works Company, your petitioner, the sum of sixteen dollars ($16) costs, and by which judgment of the supreme court of the State of Wisconsin it was ajudged that the said judgment of said circuit court of Winnebago county, so dismissing said complaint and for costs, shoud be, and the same thereby was, afirmd.

And your petitioner further states that—

2 The record of said caus was then, on said 26th day of February, 1901, at the time of the entry of said determination and judgment afirming said judgment of the circuit court of Winnebago county, before said supreme court upon apeal, and ever sins then has remaind and still remains before said supreme court and under its control, and which record embraces the whole proceeding in said caus from and including the original service of proces and the original pleadings, demurers, orders, judgment, and decision afirming the same; the whole of which record is now before your honor for inspection and examination.

And your petitioner further shows that—

In said suit and in the judgment therein renderd in the circuit court of Winnebago county and in the final judgment in supreme court of the State of Wisconsin, afirming the final judgment of the circuit court of Winnebago county, there was drawn in question the validity of a statute of the State of Wisconsin to wit, chapter 59 of the Laws of the State of Wisconsin for the year 1891, and especialy sections 1 and 5 of subchapter 9 of said chapter 59, on the ground of its being repugnant to the Constitution of the United States, and the decision and judgment of said circuit court of Winnebago county and

of said supreme court of the State of Wisconsin upon apeal afirming said judgment of the circuit court of Winnebago county was and is in favor of its validity agenst the contention of your petitioner, resting on and based upon the Constitution of the United States, as more fuly apears in the asignment of erors herewith presented, a copy of which is hereto atacht and made a part hereof.

3 In all of such decisions manifest eror hath hapend to the great damage of your petitioner; all of which apears in the record of said suit and proceedings now shown to you and under your control.

Wherefore your petitioner prays for the alowance of a writ of eror from the Supreme Court of the United States to the supreme court of the State of Wisconsin, to the end that such erors, if any there be, may be corected.

Dated March 13th, A. D. 1901.

MOSES HOOPER,
Atorney and Counsel for the Oshkosh Water Works Company.

The statements and alegations of the foregoing petition found to be true and the prayer thereof is granted and writ of eror alowd this 14 day of March, A. D. 1901.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. Petition for writ.

[Reform spelling intended.]

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the chief justice and justices of the supreme court, State of Wisconsin, Greeting:

Becaus in the record and proceedings, and also in the rendition of a final judgment in a plea which is in the supreme court of the State of Wisconsin, the whole record in which plea is before you, being the highest court of law or equity of the State in which a decision coud be had in the said suit between The Oshkosh Water Works Company, plaintif and appellant, agenst The City of Oshkosh, defendant and respondent, wherein was drawn in question the validity of a statute of the State of Wisconsin, on the ground of its being repugnant to the Constitution of the United States, and the decision was and is in favor of its validity, and manifest eror hath hapend, to the great damage of the said The Oshkosh Water Works Company, abuv named, as by its complaint apears, we, being willing that such eror, if any hath hapend, shoud be duly corected and ful and speedy justice dun to the parties aforesaid in this behalf, do comand you, if judgment be givn therein, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you hav the

same at Washington on the 12th day of April next, in said Supreme Court, that, the record aforesaid being inspected, the said Supreme Court may caus further to be dun therein to corect that eror what of right and acording to the laws and customs of the United States shoud be dun.

5 Witnes the Honorabl Melville W. Fuller, Chief Justice of said Supreme Court of the United States, this 14th day of March, A. D. 1901, and of the Independence of the United States the 125th.

EDWARD KURTZ,
Clerk U. S. Circuit Court for the Eastern Dist. of Wisconsin.

Alowd by me this 14 day of March, A. D. 1901.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of Wisconsin.

6 STATE OF WISCONSIN, *ss:*

Supreme Court.

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. Writ of error.

[Reform spelling intended.]

7 In Supreme Court of the United States, of October Term, in the Year of Our Lord 1900, to wit, on the 13 Day of March, 1901.

THE OSHKOSH WATER WORKS COMPANY, Plaintif in Eror,
vs.
CITY OF OSHKOSH, Defendant in Eror.

Afterwards, to wit, on the 13 day of March, 1901, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, cums the said plaintif in eror abuv named, by its atorney, Moses Hooper, and says that in the record and proceedings aforesaid there is manifest eror, in this, to wit:

I.

That the complaint of the plaintif below, plaintif in eror aforesaid, is suficient in law to entitle the said plaintif in eror, plaintif below, to hav and recuver from the defendant in eror, defendant below, judgment acording to the prayer of said complaint, the demurer of the defendant in eror, defendant below, to the said com-

plaint notwithstanding, and that it was eror for the said the Winnebago county circuit court and of the supreme court of the State of Wisconsin to sustain the said demurer and to hold the complaint insuficient to entitle the plaintif in eror, plaintif below, to hav judgment as therein prayd.

II.

That by the record aforesaid it apears that the judgment aforesaid was givn for the said defendants in eror, whereas by the law
8 of the land and pursuant to the Constitution of the United States the said judgment ought to hav been givn for the said plaintif in eror agenst the said defendants in eror.

III.

In said suit and the final judgment renderd therein there was drawn in question the validity of a statute of the State of Wisconsin, to wit, chapter 59 of the Laws of Wisconsin for 1891, on the ground of its being repugnant to the Constitution of the United States, and to that claus thereof providing that "no State shal * * * pas any * * * law impairing the obligation of contracts," and the decision, which is the basis of said judgment of the said supreme court and the circuit court of Winnebago county, was in favor of the validity of such statute.

IV.

By and under said judgment of the circuit court of Winnebago county and the judgment and decision of the supreme court of the State of Wisconsin afirming the same, it was eroneusly held, as matter of law, that the amended charter of the city of Oshkosh (being chapter 59 of the enactments of the legislature of the State of Wisconsin for the year 1891, and especialy of sections 1 and 5 of subchapter 9 of said chapter 59) did not, so far as it relates to the contract set up in the complaint of the plaintif herein, impair the obligation of the contract, and it was eroneusly held that the plaintif in eror, The Oshkosh Water Works Company, coud not maintain its said action agenst The City of Oshkosh, defendant in eror, on acount of the provisions of the said amended charter (chapter 59, Laws of Wisconsin for 1891, and especialy on acount of sections 1 and 5 of subchapter 9 of said chapter 59).

9 Wherefore the plaintif in eror herein prays that the judgment of the said circuit court of Winnebago county and the judgment of the supreme court of the State of Wisconsin aforesaid, afirming the same and making the same final, as aforesaid, may be reverst, anuld, and altogether held for nothing, and that the said demurer of the said defendant, defendant in eror, The City of Oshkosh, to the complaint of the said plaintif, plaintif in eror, The Oshkosh Water Works Company, be held insuficient in law, and that the plaintif in eror, The Oshkosh Water Works Company, do hav and recuver from The City of Oshkosh, defendant in eror, its damages as stated in its said complaint, with costs of action, and that

the plaintif in eror, The Oshkosh Water Works Company, may be restored to all things which it has lost by ocasion of said judgment.

MOSES HOOPER,
Attorney for Plaintif in Eror.

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. As'g't errors.

[Reform spelling intended.]

10 Know all men by these presents that The Oshkosh Water Works Company of Oshkosh, Wisconsin, principal, and Leander Choate and Charles Schriber, of Oshkosh, Wisconsin, sureties, are held and firmly bound unto the City of Oshkosh in the sum of one thousand dollars, to be paid to it, the City of Oshkosh, and to its sucesors and asigns; to which payment, wel and truly to be made, we bind ourselvs, our and each of our sucesors, heirs, executors, and administrators, firmly by these presents.

Seald with the seal of the Oshkosh Water Works Company and executed by its president and secretary, and signd by and seald with the seals of said sureties, and dated this 13th day of March, 1901.

Whereas the abuv-named The Oshkosh Water Works Company hath prosecuted a writ of eror to the Supreme Court of the United States to reverse a judgment heretofore renderd in favor of The City of Oshkosh, obligee, and agenst the said The Oshkosh Water Works Company, obligor, in the supreme court of the State of Wisconsin, whereby there was afirmd a judgment of the circuit court of Winnebago county in favor of the said obligee, The City of Oshkosh, agenst the said obligor, The Oshkosh Water Works Company:

Now, therefore, the condition of this obligation is such that if the abuv-named The Oshkosh Water Works Company shal prosecute its said writ of eror to efect and answer all damages and costs if it shal fail to make good its plea, then this obligation shal be void; otherwize the same shal be and remain in ful force and virtue.

THE OSHKOSH WATER WORKS CO.,
By W. G. MAXCY, *Its President.*
11 [SEAL.] By ISABEL T. MAXCY, *Its Secretary.*
CHAS. SCHRIBER. [SEAL.]
LEANDER CHOATE. [SEAL.]

In presence of—
LOUIS C. COFFIN.
ED. M. HOOPER.

STATE OF WISCONSIN, } ss:
Winnebago County, }

We, Leander Choate and Charles Schriber, being duly sworn, each for himself says that he is worth the sum of ten thousand ($10,000) dollars in property not exempt from execution and over and abuv

all dets and liabilities, and that he is a freeholder of and resident of the State of Wisconsin.

CHAS. SCHRIBER.
LEANDER CHOATE.

Subscribed and sworn to before me this 13th day of March, 1901.

ED. M. HOOPER,
[NOTARIAL SEAL.] *Notary Public, Winnebago County, Wis.*

I aprove of the foregoing bond and of the suficiency of the sureties therein, and acept the same as good and suficient security upon the writ of eror in the foregoing-entitled caus.

Dated March 14, 1901.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed March 14, 1901. Clarence Kellogg, clerk of supreme court Wis.

[Reform spelling intended.]

12 UNITED STATES OF AMERICA, *ss:*

To the City of Oshkosh, Greeting:

You ar hereby cited and admonisht to be and apear at the Supreme Court of the United States, at Washington, on the 12th day of April next, pursuant to the writ of eror filed in the clerk's ofice of the supreme court of the State of Wisconsin, at the city of Madison, in the State of Wisconsin, wherein The Oshkosh Water Works Company is plaintif in eror and you, The City of Oshkosh, ar defendant in eror, to show caus, if any there by, why the final judgment renderd agenst said plaintif in eror, as in the said writ of eror mentiond, shoud not be corected and why speedy justice shoud not be dun to the parties in that behalf.

Witnes the Honorabl John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, this 14 day of March, A. D. 1901.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

[Endorsed:] Filed Mar. 14, 1901. Clarence Kellogg, clerk of supreme court Wis. Moses Hooper, attorney for pl'tf in error. Citation, &c. Originals.

[Reform spelling intended.]

13 Supreme Court of the United States.

THE OSHKOSH WATER WORKS COMPANY, Plaintif in Eror,
vs.
CITY OF OSHKOSH, Defendant in Eror.

I hereby aknolege service upon me of the petition for writ of eror, with alowance of same; asignment of erors; supersedeus bond, with

aproval and acceptance of same: writ of eror, with alowance of same, and citation, in the foregoing matter, which wer filed in the office of the clerk of the supreme court, at Madison, on the 14th day of March, 1901, by delivery to me of a duly certified copy of each of said papers, with certificate of filing of each thereof endorst thereon.

Dated March 23rd, 1901.

JOHN F. KLUWIN,
Attorney for Defendant in Eror, City of Oshkosh.

[Endorsed:] Filed Mar. 23, 1901. Clarence Kellogg, clerk of supreme court Wis.

14 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the eighth day, of January, A. D. 1901.

Present: John B. Cassoday, chief justice; John B. Winslow, Roujet D. Marshall, Charles V. Bardeen, and Joshua Eric Dodge, justices.

CLARENCE KELLOGG, *Clerk.*

Be it remembered that heretofore, to wit, on the twenty-fifth day of June, in the year of our Lord one thousand nine hundred, came into the office of the clerk of the supreme court of the State of Wisconsin The Oshkosh Water Works Company and filed in said court its certain notice of appeal and receipt for deposit, according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Winnebago county, in said State, in the words and figures following—that is to say:

15 In Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant.

To John F. Kluwin, attorney for said defendant, and Walter Lindeman, clerk of said court:

Please take notice that the plaintiff, The Oshkosh Water Works Company, appeals from the judgment rendered by the above court herein entered on the 16th day of June, A. D. 1900, in favor of the defendant, City of Oshkosh, and against the plaintiff, The Oshkosh Water Works Company, dismissing plaintiff's complaint, and for sixteen dollars costs.

Dated Oshkosh, June 18, 1900.

Yours, etc., HOOPER & HOOPER,
Attorneys for Plaintiff.

(Endorsements:) In circuit court, Winnebago county. The Oshkosh Water Works Company *v.* City of Oshkosh. Notice of appeal to supreme court. Within notice of appeal served on me and $250

deposited June 18, 1900. W. M. Lindeman, clerk Win. Co. cir. court. Within notice of appeal and notice deposit thereon endorsed served on me June 18, 1900. John F. Kluwin, attorney for defendant. On within appeal appellant has deposited with the clerk of said court $250, under section 3051, as security for costs and damages, in lieu of bond provided by sec. 3052, Wis. Rev. Stat., and taken his receipt therefor. June 18, 1900. Hooper & Hooper, pl'ff's attorneys. To John F. Kluwin, def't's attorney. Filed June 18, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

16 In Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } Duplicate.

The plaintif, on apealing from the judgment enterd herein June 16th, 1900, dismissing the plaintif's complaint and for sixteen dollars costs, has deposited with the clerk of this court $250 as security that the appellant wil pay all costs and damages which may be awarded agenst it on the said apeal pursuant to the provisions of Revised Statutes, section 3051 and 3052.

W. M. LINDEMAN,
Clerk of the Circuit Court.

Dated June 18, 1900.

(Endorsements:) Win. Co. cir. court. The Oshkosh Water Works Company, plaintiff, *vs.* City of Oshkosh. Receipt for deposit under sec. 3051. Duplicate original served on me June 18, 1900. John F. Kluwin, def't's attorney. Filed June 18, 1900. W. M. Linderman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

[Reform spelling intended.]

17 STATE OF WISCONSIN, } *ss:*
Winnebago County, }

Louis C. Coffin, being duly sworn, on oath deposes and says that he serv'd the anext summons and complaint on The City of Oshkosh, the defendant therein named, by delivering to and leaving with J. H. Merrill, mayor of the said city of Oshkosh, personaly, a true and corect copy thereof at the city of Oshkosh, Winnebago county, Wisconsin, on the 11th day of May, 1900, and by delivering to and leaving with Dan. Witzel, city clerk of the said city of Oshkosh, personaly, a true and corect copy thereof at the city of Oshkosh, Winnebago county, Wisconsin, on the 19th day of May, 1900.

LOUIS C. COFFIN.

Subscribed and sworn to before me this 21st day of May, 1900.

C. E. NELSON,
Notary Public, Winnebago County, Wisconsin.

(Endorsements:) Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

18 Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

HOOPER & HOOPER,
Plaintiff's Attorneys.

P. O. address, Oshkosh, Winnebago county, Wis.

(Endorsements:) Summons. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

[Reform spelling intended.]

19 In Circuit Court, Winnebago County.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

Complaint.

The plaintif complains of the defendant for this, that:

First Caus of Action.

I.

The City of Oshkosh is and for more than twenty years last past has been a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

The Oshkosh Water Works Company is and ever sins the 1st day of June, 1883, has been a corporation, commonly calld a joint stock company, organized and existing under and by virtue of the laws of the State of Wisconsin.

III.

On the 18th day of June, 1883, said The Oshkosh Water Works Company, in name of Oshkosh Water Works Company, and said

City of Oshkosh, each in consideration of the agreements of the other, enterd into an agreement whereby said The Oshkosh Water Works Company agreed to bild and maintain a water-works plant in the city of Oshkosh to suply water to said city for domestic and fire purposes, and whereby said City of Oshkosh did agree and bind itself to rent and did thereby rent from said The Oshkosh Water Works Company 200 public fire-hydrants, to be located on the mains of said The Oshkosh Water Works Company, and to be suplied with water by said The Oshkosh Water Works Company for
20 and during the term of thirty years from and after the completion of the works.

In and by said contract said City of Oshkosh agreed to pay the Oshkosh Water Works Company the rental of seventy dollars ($70) per anum for the use of each of said hydrants, payabl quarter yearly, on the 1st days of January, April, July, and October of each and every year during the term of said contract. The term of said contract extended for a period of thirty years from June 18th, 1883. Said works wer completed and accepted by said City of Oshkosh on or about the 1st day of October, 1884, and said hydrants wer located on said mains on or about the 1st day of October, 1884.

IV.

In and by said contract said City of Oshkosh also agreed with and bound itself to said The Oshkosh Water Works Company to rent from said The Oshkosh Water Works Company such hydrants as the city might thereafter require and locate upon the mains of said water works company in addition to the 200 hydrants and to pay for the same the sum of sixty dollars ($60) per anum per hydrant for the first 100 hydrants aditional. Under said last claus of said agreement said City of Oshkosh located 39 hydrants prior to the 1st day of May, 1890.

V.

The Oshkosh Water Works Company has sins making said contract duly performd all the conditions thereof on its part and has suplied such 239 hydrants with water and has by the performance of such conditions becum entitled to hav and receiv of and from the defendant the amount of rental of said 200 hydrants at seventy dollars ($70) each per anum, and also the rental of said 39 hydrants at sixty dollars ($60) each per anum, and to receiv the same quarterly, and there became due to said The Oshkosh Water Works Company from said City of Oshkosh on October 1st, 1898, on account of the quarterly rental of said 200 hydrants at $70 each per anum
21 for the third quarter of the year 1898, the sum of three thousand five hundred dollars ($3,500), and on acount of the quarterly rental of said 39 hydrants at sixty dollars ($60) each per anum, for the third quarter of the year 1898, the sum of five hundred and eighty-five dollars ($585).

VI.

That on the 1st day of October, 1898, this plaintif duly demanded of this defendant payment on acount thereof of said sums of $3,500

and $585, but this defendant then and there and at all times since said date has refused to pay said sums or any part thereof; that no part of same has ever been paid.

Second Cause of Action.

VII.

The City of Oshkosh is and for more than twenty years last past has been a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

VIII.

The Oshkosh Water Works Company is and ever sins the 1st day of June, 1883, has been a corporation, commonly calld a joint stock company, organized and existing under and by virtue of the laws of the State of Wisconsin.

IX.

On or about August 31st, 1891, the plaintif and defendant enterd into an agreement, each in consideration of the agreements of the other, that the plaintif shoud make such extensions of its then existing water mains in said City of Oshkosh as the defendant might thereafter order, on condition that said City of Oshkosh order hydrants to be located on such extensions at the average rate of one hydrant to every 528 feet of such extensions, and in consideration thereof and that same be suplied with water the said City of
22 Oshkosh promist and agreed to pay to the plaintif for such hydrants a rental of forty dollars ($40) per anum per hydrant until the 18th day of June, 1913, hydrant rental payabl quarterly on the 1st days of January, April, July, and October of each year.

X.

Pursuant to such last-named contract, the City of Oshkosh did order extensions of the mains of the plaintif as folows: 1,050 feet on Fifth street, 1,124.8 feet on Frankfort street, 5,568.4 feet on Merritt, Hazel, and Polk streets and plaintif's land, 2,116 feet on Mt. Vernon street, 3,573 feet on New York avenue, 1,170.8 feet on Elm street, 3,395 feet on Scott street, 1,654 feet on Sixth street, 1,821.6 feet on Ninth street, 1,152 feet on Fourteenth street, 282 feet on Kansas street, 2,437 feet on Seventeenth street, 2,442.4 feet on Doty street, 524 feet on Algoma street, 2,960 feet on West Algoma street, 2,613 feet on Thirteenth street, 948 feet on East Irving street, 2,914 feet on New street and First avenue, 2,635 feet on Barber avenue, 1,056 — on Jackson street, 3,882 feet on School and Otter streets, 1,056 feet on Main and Custer streets, 775 feet on Kansas street, 540 feet on Bauman avenue, 1,297 feet on Tenth street, 2,717 feet on Pearl street, 528 feet on Ackerman street, 845 feet on Dakota street, 416 feet on Punhoqua street, 530 feet on Tenth street, 1,073 feet on Oregon street, 935 feet on Broad street; on acount of which ex-

tensions this plaintif was entitled that the City of Oshkosh should locate under such contract 106 hydrants, and on such extensions and on such other mains as plaintif and defendant agreed upon by way of substitution the City of Oshkosh did locate 95 hydrants prior to the 1st day of October, 1898, and plaintif has ever sins suplied such hydrants with water.

In consideration that this plaintif woud not then demand and insist upon the location of other hydrants upon the extensions of its mains as hereinbefore last stated, but woud leav the city at
23 liberty to locate such hydrants thereafter on its mains in such parts of the city of Oshkosh as the city might chuze, the said city agreed with this plaintif on or about the — day of March, 1893, to pay it for the number of unlocated hydrants, on the basis of one hydrant to each 528 feet of extension, upon said extensions of its mains, the said anual rental of $40 per anum for each unlocated hydrant, and that the plaintif has duly performd all the conditions of said contract on its part to be performed, whereby the plaintif became entitled to hav and receiv of and from the defendant, The City of Oshkosh, on acount of such extensions of its mains and the location of said 95 hydrants and the agreement respecting the other 11 unlocated hydrants, $40 per anum on 106 hydrants, and on acount of which there became due to this plaintif from the City of Oshkosh on the 1st day of October, 1898, for hydrant rental for the third quarter of the year 1898 the sum of one thousand and sixty dollars ($1,060).

XI.

That on the 1st day of October, 1898, this plaintif duly demanded of this defendant payment on acount thereof of the said sum of $1,060, but said defendant, The City of Oshkosh, then and there and at all times sins said date has refused to pay the said sum or any part thereof; that no part of same has ever been paid.

Wherefore the plaintif demands judgment agenst the City of Oshkosh for the sum of five thousand one hundred and forty-five dollars ($5,145) and interest thereon from the 1st day of October, 1898, besides the costs of this action.

HOOPER & HOOPER,
Plaintif's Atorneys.

STATE OF WISCONSIN, } ss:
Winnebago County, }

W. G. Maxcy, being duly sworn, on oath deposes and says
24 that he is the president of The Oshkosh Water Works Company, the plaintif in the foregoing action, and makes this verification in its behalf; that he has red the foregoing complaint and knows the contents thereof, and that the same is true of his own knolege.

W. G. MAXCY.

Subscribed and sworn to before me this 10th day of May, 1900.
C. E. NELSON,
Notary Public, Winnebago Co., Wis.

(Endorsements:) No. 1. In circuit court, Winnebago county. The Oshkosh Water Works Company, plaintiff, *vs.* City of Oshkosh, defendant. Summons and complaint. Original. Hooper & Hooper, for plaintiff. File 770. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

25 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
versus
CITY OF OSHKOSH, Defendant. } (Case 1.)

To the first cause of action of the complaint herein the defendant, The City of Oshkosh, demurs upon the ground that, as it appears upon the face thereof—

1.

This court has no jurisdiction of the person of the defendant or of the subject of the action.

2.

That the plaintiff has not legal capacity to sue.

3.

That the complaint does not state facts sufficient to constitute a cause of action.

To the second cause of action the defendant herein, The City of Oshkosh, demurs upon the ground that, as it appears upon the face thereof—

1.

That this court has no jurisdiction of the person of the defendant or of the subject of the action.

2.

That the plaintiff has no legal capacity to sue.

3.

That the complaint does not state facts sufficient to constitute a cause of action.

JOHN F. KLUWIN,
Attorney for Defendant.

26 (Endorsements:) (Case 1.) In circuit court, Winnebago county. The Oshkosh Water Works Company *vs.* City of Oshkosh. Demurrer. John F. Kluwin, attorney for defendant. Service of the within demurrer by copy admitted this 8th day of June, A. D. 1900. Hooper & Hooper, plaintiff's att'ys. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

27 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

May term, 1900, court-house, Winnebago county, Wisconsin.

Present: Hon. G. W. Burnell, judge.

The issues of law raised herein by the demurrer of the defendant to the complaint of the plaintiff in this action duly coming on to be heard upon due notice, Hooper & Hooper appearing for plaintiff, and John F. Kluwin for defendant, the plaintiff having urged in opposition to said demurrer the provisions of the Constitution of the United States following, to wit, "No State shall * * * pass any * * * law impairing the obligation of contracts," and having stated in open court that the plaintiff did not desire to amend its complaint or to serve an amended complaint herein, it is considered that the demurrer herein is well taken, and it is—

Ordered that the same be sustained, and that the defendant have judgment dismissing the complaint of the plaintiff and for its costs.

June 16th, 1900.

By the court:

GEO. W. BURNELL, *Judge.*

And now comes the plaintiff, after the making of the foregoing order and before the entry of judgment, and excepts to the same on account that it is contrary to law.

HOOPER & HOOPER,
Attorneys for Plaintiff.

28 (Endorsements:) In circuit court, Winnebago county. The Oshkosh Water Works Company *vs.* City of Oshkosh. Order sustaining defendant's demurrer. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

29 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
vs.
CITY OF OSHKOSH, Defendant. } No. 1.

The demurrer of the defendant to the complaint of the plaintiff herein having been brought on for hearing, and the counsel for the respective parties having appeared and presented their arguments, and the same having been considered by the court and said demurrer having been sustained, and plaintiff having stated in open court that it did not desire to amend its complaint or to serve an amended complaint herein, and thereupon judgment having been ordered thereon in behalf of the defendant against the plaintiff, it is now, on motion of John F. Kluwin, attorney for the defendant—

Considered and adjudged that the complaint of the plaintiff be, and the same is hereby, dismissed; and it is further—

Considered and adjudged that the defendant, City of Oshkosh, do have and recover of and from the plaintiff, The Oshkosh Water Works Company, the sum of sixteen dollars ($16) costs.

June 16, 1900.

By the court:

GEO. W. BURNELL, *Judge.*

(Endorsements:) In circuit court, Winnebago county. Oshkosh Water Works Company *vs.* City of Oshkosh. Judgment dismissing complaint. Filed June 16, 1900. W. M. Lindeman, clerk of courts. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

30 In Circuit Court, Winnebago County, Wisconsin.

THE OSHKOSH WATER WORKS COMPANY, Plaintiff,
against
THE CITY OF OSHKOSH, Defendant.

STATE OF WISCONSIN, } ss:
County of Winnebago, }

I, W. M. Lindeman, clerk of the circuit court in and for Winnebago county, Wisconsin, do hereby certify that the papers hereto attached are the original papers and records necessary on appeal filed and of record in my office in the above-entitled cause, and that the same are hereby transmitted to the supreme court of Wisconsin pursuant to such appeal.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said circuit court this 19th day of June, A. D. 1900.

W. M. LINDEMAN, *Clerk.*

31 (Endorsements:) Circuit court, Winnebago county. The Oshkosh Water Works Company, plaintiff, *vs.* The City of Oshkosh, defendant. Appeal to supreme court. Filed June 25, 1900. Clarence Kellogg, clerk of supreme court Wis.

32 And afterwards, to wit, on the twelfth day of January, A. D. 1901, the same being the fifth day of said term, the following proceedings were had in this court in said cause—that is to say:

Winnebago Circuit Court.

OSHKOSH WATER WORKS COMPANY, Appellant,
vs.
CITY OF OSHKOSH, Respondent.

And now, at this day, came the parties herein, by their attorneys, and this cause having been argued by Moses Hooper, Esq., for the said appellant and by John F. Kluwin, Esq., for the said respondent

and submitted, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

33 And afterwards, to wit, on the twenty-sixth day of February, A. D. 1901, the same being the nineteenth day of said term, judgment was rendered in said cause by this court in the words and figures following—that is to say:

Winnebago Circuit Court.

OSHKOSH WATER WORKS COMPANY, Appellant, *vs.* CITY OF OSHKOSH, Respondent. } Opinion by Justice Dodge.

This cause came on to be heard on appeal from the judgment of the circuit court of Winnebago county and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Winnebago county in this cause be, and the same is hereby, affirmed, with costs against the said appellant taxed at the sum of forty-eight and $\frac{75}{100}$ dollars ($48.75).

Justice Bardeen dissents.

34 And thereupon this court, by Justice Dodge, filed its opinion in said cause in the words and figures following—that is to say:

35 OSHKOSH WATER WORKS COMPANY, Appellant, *vs.* CITY OF OSHKOSH, Respondent.

This is an appeal by the plaintiff from judgment dismissing his complaint entered on sustaining a demurrer thereto. The complaint alleged the making of a contract between the plaintiff and the defendant on June 18, 1883, for payment to the plaintiff, quarterly, of a certain sum as compensation for supplying the water to hydrants for fire and other city purposes; the construction of water works by the plaintiff in compliance with that contract on or before October 1, 1884, and the refusal of the city, on demand, to pay the hydrant rental, amounting to $4,085, earned under such contract for the quarter ending October 1, 1898; also the making of a subsequent contract on August 31 for payment of hydrant rentals on certain extensions, the performance thereof by the plaintiff, and refusal by defendant to pay the hydrant rental earned thereunder for the same quarter, amounting to $1,060. The demurrer was on three grounds: First, want of jurisdiction of the person or of the subject of the action; second, that plaintiff has not legal capacity to sue, and third, that the complaint fails to state facts sufficient to constitute a cause of action.

DODGE, *J.*:

The only assignment of error argued by appellant is that the court erred in holding that the charter of the city of Oshkosh, ch. 59, Laws of 1891, did not, so far as it relates to the contract of June 18, 1883, impair the obligation of the contract. It is contended that said charter does so impair and therefore contravenes sec. 12, art. I, of the constitution of Wisconsin, which provides: "No bill of attainder, *ex post facto law*, nor any law impairing the obligation of contracts, shall ever be passed."

36 At the time of making the contract of June 18, 1883, the city of Oshkosh existed and operated under a charter known as ch. 183 of P. and L. Laws of 1883, the first section of which constituted it "a municipal corporation by the name of the city of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity." That charter, sec. 1, ch. VII, provided that moneys "shall be drawn out only upon the order of the mayor and city clerk, duly authorized by vote of the common council," and by sec. 10, ch. VII, "any account or demand against the city before acted upon or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law." Except for these restrictions upon the payment of money, the city of Oshkosh was subject to suits upon contract liability, like any other person or corporation.

In 1891 was enacted a revised charter, ch. 59, P. & L. Laws of 1891, continuing substantially the provisions formerly existing in the first section and in sections 1 and 10 of ch. VII. That charter, however, contained a subchapter, XXI. It provided: "Section 4. No action shall be maintained by any person against the city upon any claim or demand until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation thereof shall be deemed a disallowance thereof.

"SECTION 5. The determination by the common council disallowing in whole or in part any claim shall be final and conclusive and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council as in this act provided."

Section 6 provided for the appeal in case of disallowance in whole or in part, to be accomplished by serving a written notice of
37 the appeal on the city clerk within twenty days after the disallowance of the claim, and by executing a bond to the city in the sum of $150, with two sureties, to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of the appeal and payment of costs, whereupon the clerk is required to transmit the decision and a brief statement of the proceedings and all papers to the clerk of the circuit court of the county, where "such case shall be entered, tried, and determined in the

same manner as cases originally commenced in said court," costs to be recovered by plaintiff in case of an increase in the recovery.

This amendment of the charter of Oshkosh was but one of many such amendments to city charters occurring at about that time significant of a marked change of legislative policy with reference to enforcement of money demands against cities. That policy was signified by its adoption in the general city charter promulgated by the legislature of 1889 for cities thereafter to be organized. That policy has been considered by this court in a series of decisions which it is believed have fully recognized and emphasized it. We have held that the preliminary steps are jurisdictional, and that unless complied with the court fails to acquire jurisdiction of the subject-matter; that the various steps are mandatory and cannot be waived by the officers of the city, nor can jurisdiction be conferred by such officers—Telford *v.* Ashland, 100 Wis., 238; Oshkosh Water Works Co. *v.* Oshkosh, 106 Wis., 83; that the bond cannot be amended nor a new bond given after the expiration of the twenty days—Oshkosh Water Works Co. *v.* Oshkosh, *supra*.

It is, of course, obvious that the amendment of the charter does not expressly and directly affect the obligation of any existing contracts. It is a change of the law regulating the remedy, and obviously, too, with only that purpose in view. The question, therefore, which is presented before us is whether, as to claims
38 which have not been allowed by the council (for there is no allegation that this has been allowed), the change in the methods open to a creditor of the city for the adjudication and recovery of such claim is such that although acting directly only on the remedy, it necessarily impairs the obligation of the contract itself.

We here enter a field redundant of learned discussion, philosophy, and decision, in which, as remarked by Mr. Justice Shiras, the very frequency of decision would appear to have rendered it difficult to apply the result of the court's deliberations to new cases differing somewhat in their facts from those previously considered. Barnitz *v.* Beverly, 163 U. S., 121. Several general propositions are, however, settled so as to require in new cases merely their application. First and most primary amongst these is that an act which in any degree, no matter how slightly, modifies the obligation of the contract by attempting to relieve the one party from any duty by the contract assumed is repugnant to the constitutional prohibition. This rule applies to "legislation which affects the contract directly, and not incidentally or only by consequence." Von Hoffman *v.* Quincy, 4 Wall., 553. Another general rule early established is that over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. For example, it would be intolerable that new laws regulating place or frequency of the sitting of courts could not be enacted and be effective generally, even as to pre-existing rights of individuals, although remotely they affect those rights by adding inconvenience or delay to their enforcement.

It is obvious, however, that rights, whether contractual or other, are so dependent for their value upon the means of enforcing them that for all practical purposes their extinction may be accomplished by laws which in form affect only the remedy. It matters little whether it be enacted that certain debts are extinguished or merely that they shall not be enforcible in any forum. In either case the legally binding obligation to pay is destroyed. One of the best actual illustrations of such a result is exhibited by Cornell *v.* Hichens, 11 Wis., 368, where was considered an enactment that in any suit on negotiable bonds and mortgage given to a railway company, although brought by an innocent holder for value, the defendant might answer, alleging misrepresentation in procurement or want of consideration; that such issue should then be tried by a jury, and that if the jury found such fact to exist judgment should be entered for the defendant. That law ostensibly regulated the remedy only, the pleadings and procedure in the course of a suit, but its direct and obvious intention and result was to absolve the defendant from his promise, by law embodied in the negotiable bond, that he would pay the amount to any *bona fide* holder, even though it had been obtained from him by misrepresentation or without consideration, a result prohibited by the Constitution.

In attempted recognition both of the necessity for freedom of general legislation as to remedies and procedure and of the constitutional inviolability of the obligation of contracts, the courts early sought middle ground on which both rights might be protected. In Wisconsin the limits of that middle ground have received definition in a multitude of cases, important among which are the following: Lightfoot *v.* Cole, 1 Wis., 26, 33; Von Baumbach *v.* Bade, 9 *id.*, 559; Starkweather *v.* Hawes, 10 *id.*, 125; Cornell *v.* Hichens, 11 *id.*, 368; Streubel *v.* Railway, 12 *id.*, 67; Oatman *v.* Bond, 15 *id.*, 20; State *ex rel.* Soutter *v.* Madison, 15 *id.*, 30; Paine *v.* Woodworth, 15 *id.*, 298; Hasbrouck *v.* Shipman, 16 *id.*, 296; Selsby *v.* Redlon, 19 *id.*, 17; Nelson *v.* Rountree, 23 *id.*, 367; Sydnor *v.* Palmer, 32 *id.*, 406, 410; Northwestern Mutual Ins. Co. *v.* Reeves, 46 *id.*, 147; Lee *v.* Buckheit, 49 *id.*, 54; Rosenthal *v.* Wehe, 58 *id.*, 621; Hall *v.* Banks, 79 *id.*, 229; Second Ward Savings Bank *v.* Schranck, 97 *id.*, 250; Peninsular L. & C. Works *v.* Union O. & P. Co., 100 *id.*, 488; Eau Claire Bank *v.* Macauley, 101 *id.*, 304.

In Lightfoot *v.* Cole, 1 Wis., 26, 34, in discussing a statute which abolished the pre-existing common-law and equitable suits on claims against insolvent estates and substituted in lieu a presentation and hearing before commissioners appointed by probate court, this court, by Crawford, J., declared "it was entirely within the control of the legislature to prescribe and modify the remedies which might be pursued in the courts of the Territory, and to provide one particular manner of proceeding, to the exclusion of others, so long as some specific remedy was preserved." The subject received more thorough consideration in Von Baumbach *v.* Bade, 9 Wis., 559, where was presented a law providing that in suits to foreclose mortgages defendant should have six months to answer before default,

instead of twenty days, and that notice of sale should be published six months, instead of six weeks, as theretofore required. The rule under consideration was there laid down, page 577, by Dixon, C. J., as follows: "It being determined that the remedy or laws for enforcement of a contract existing at the time it is made enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change, or amendment of such remedy or laws which in any manner delayed or rendered the enforcement of the contract less complete and effectual would be unconstitutional and void; but such is not the case. All the authorities agree that it is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." The court also adopted the following language from Bronson *v.* Kinzie, 1 How. (U. S.), 311: "Al-
41 though a new remedy may be deemed less convenient than the old one and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution."

This subject received renewed careful attention in the recent cases of The Second Ward Savings Bank *v.* Schranck, *supra*, and Peninsular L. & C. Works *v.* Union O. & P. Co., *supra*, where the rule of Von Baumbach *v.* Bade was substantially reasserted, it being said in elucidation thereof by Pinney, J.: "Any legislation, though acting merely on the remedy, that substantially impairs or lessens the value of a contract is forbidden by the constitution, and therefore void."

The latest declaration of the rule on this subject by the Supreme Court of the U. S. is found in McCullough *v.* Virginia, 172 U. S., 102, 124, as follows: "It is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract if any adequate and efficacious remedy be left."

It is conceived that the various forms of expression adopted are intended to express the same idea, namely, that if neither party is relieved from performing anything of that which he obliged himself to do the obligations of the contract are not impaired, but if he be absolved from performing any of those things such obligations are impaired, whether the absolution is accomplished directly and expressly or indirectly and only as a result of some modification
of the legal proceedings for enforcement. As the sub-
42 ject is in every case an important one, and as the attempts of different writers and jurists to express the true rule thereon do not entirely agree, and at best seem to be capable of different interpretations, it has seemed to me advisable, even at the expense

of considerable space, to bring together the concrete instances of application of that rule by this court and by the Supreme Court of the United States, which is, of course, the ultimate authority. The following are substantially all of the important cases in this court and the most typical of those in the United States Supreme Court, which are valuable illustrations under the rule we are now considering:

A statute cutting off all ordinary and common-law proceedings previously existing for enforcement of claims against executors when the estate was insolvent, and prescribing a special remedy by presentation and proof before commissioners of the probate court and ratable sharing in the assets, held within the power of the legislature, because some specific remedy was preserved. Lightfoot *v.* Cole, 1 Wis., 26.

An act changing the time for answer and default from twenty days to six months in foreclosure actions, and changing notice of sale from six weeks to six months, held not to impair the obligation of pre-existing mortgages. Von Baumbach *v.* Bade, 9 Wis., 559.

The same act held applicable to sales under pre-existing judgments and sustained. Starkweather *v.* Hawes, 10 Wis., 125.

A law giving a laborer for railroad contractors right of recovery against the company amended after performance of work so as to take away that right held not to impair the contract of indebtedness between the laborer and his employer, but merely to take away one of two remedies, leaving still an adequate remedy against his debtor. On rehearing it was concluded that the earlier statute created a contract between the laborer and the railroad company, and the obligation of such contract was by the later act impaired, because the only remedy was destroyed. Streubel *v.* Railway, 12 Wis., 67.

Change of procedure in method of acquiring and enforcing log liens not unconstitutional as applied to existing claims. Paine *v.* Woodworth, 15 Wis., 298.

Statute validating executions under justice of the peace judgments held constitutional. Selsby *v.* Redlon, 19 Wis., 17.

A statute enacted after a judgment in ejectment, taking away the pre-existing right, of course, to a motion and order for a new trial, held matter of remedy only and valid. Sydnor *v.* Palmer, 32 Wis., 406.

Change of procedure for foreclosure of mortgages, whereby, instead of an immediate personal judgment, to be followed by an immediate sale, subject to one year's redemption, there was only permitted a judgment postponing the sale for one year and allowing a personal judgment only for the deficiency to be ascertained after such sale, held to merely regulate the remedy and not impair obligations of the mortgage. Northwestern Mut. Ins. Co. *v.* Neeves, 46 Wis., 147.

A statute imposing additional terms on change of venue, held goes only to remedy, affects pre-existing actions, and not unconstitutional. Lee *v.* Buckheit, 49 Wis., 54.

Change of practice as to mechanics' liens from law to equity, with substantial alteration as to form of judgment, method of sale, etc.,

ch. 143, R. S. 1878, held applicable to pre-existing claims; constitutionality apparently never questioned. George *v.* Everhart, 57 Wis., 397.

Existing law made validity of attachment depend on sufficiency of accompanying affidavit. Subsequent statute permitting attachment to stand on amended affidavit afterward filed held remedial only and to apply to pre-existing contracts and suits. Rosen-
44 thal *v.* Wehe, 58 Wis., 621.

Abolition of imprisonment for debt held no impairment of contract. Sturges *v.* Crowninshield, 4 Wheat., 122; Penniman's case, 103 U. S., 714.

Reasonable additional exemptions from execution do not impair obligation of contract. Bronson *v.* Kinzie, 1 How. (U. S.), 311; Edwards *v.* Kearzey, 96 U. S., 595, 604, opinions Hunt and Clifford, JJ.; *contra*, S. C., Swayne, J.

Statute changing the law by requiring that suit on notes owned by banks be brought in the name of the cashier does not impair the obligation of contracts. Crawford *v.* The Mobile Bank, 7 How. (U. S.), 299.

Existing law as to sale of decedent's real estate required it to be at public, open sale on full notice, and new law authorized a private sale under direction and approval of the court. Held no impairment of existing contracts between estate and its creditors. Florentine *v.* Barton, 2 Wall., 210.

Imposing a notice as a condition of taking out tax deed held no impairment of contract embodied in the certificate. Curtis *v.* Whitney, 13 Wall., 68, affirming Curtis *v.* Morrow, 24 Wis., 664.

Where charter of corporation required service of process on its president a subsequent statute authorizing service on other officers held not to impair the contract. Cairo, etc., R. R. Co. *v.* Hecht, 95 U. S., 168.

Statutes of limitation, provided reasonable time is allowed for commencement of suit. Terry *v.* Anderson, 95 U. S., 628; Koshkonong *v.* Burton, 104 *id.*, 668; Mitchell *v.* Clark, 110 *id.*, 633; Relyea *v.* Tomahawk P. Co., 102 Wis., 301.

Under pre-existing law State bank bills were made receivable for taxes. Tax-payer could compel receipt by mandamus or have other common-law remedies. New law prohibited their receipt
45 and also prohibited any process to compel it, and denied all remedy except to allow payment under protest after tendering the bank bills and a suit substantially against the State to recover back, the judgment to be enforcible only by entitling claimant to a comptroller's warrant, payable when funds were in State treasury. Held that an adequate remedy being given, there was no impairment of the obligations of the contract resulting from the cutting off of the former existing remedies. Tennessee *v.* Sneed, 96 U. S., 69; Antoni *v.* Greenhow, 107 *id.*, 769; McCullough *v.* Virginia, 172 *id.*, 102, 124.

Nor did impairment result from a later statute repealing that above mentioned, whereby the existing remedy of suit against the

State was taken away and common-law remedies revived. McCullough *v.* Virginia, *supra*.

A statute subsequent to the issue of bonds prohibited mandamus or other process against individual officers of a city to enforce judgment, and also prohibited execution and substituted as the sole remedy a registration of the judgment, accompanied by a duty on the city officers to pay out of first available money. Held adequate remedy for enforcement of pre-existing debts and not unconstitutional, reserving power of court to compel city to provide money if it failed to do so in the next succeeding tax levy. Louisiana *v.* New Orleans, 102 U. S., 203.

Under pre-existing law of Louisiana minors, etc., had tacit mortgages on the property of their guardians and tutors. A subsequent act denied validity to such tacit mortgages unless registered, allowing less than a year for registration of existing ones. Held valid for the reason that it left an adequate remedy. Vance *v.* Vance, 108 U. S., 514, 518.

Law authorizing service of process on mayor or clerk may be changed to require service on the mayor without impairing obligation of prior contracts. Perkins *v.* Watertown, 5 Biss., 320.

46 Ch. 49, Laws of 1858, made fraud in procuring railroad farm mortgages or want of consideration an absolute defense in suit even by an innocent holder for value. Held to impair the obligation of the contract. Cornell *v.* Hichens, 11 Wis., 368.

Ch. 88, Laws of 1861, greatly modified the remedy upon farm mortgages to corporations. It required security for costs; deprived parties of trial before court, substituting a referee with extremely dilatory procedure before him; gave intermediate appeal on rulings as to evidence, with stay; extended the time for appeal four years with stay meanwhile, apparently without bond; provided that no title should be acquired on the sale under any judgment until that time for appeal expired; provided that such sale should be of no effect in case of reversal; denied the right to any deficiency judgment; denied plaintiff right of appeal until he had paid all costs; required suit on the note or bond alone to be in the county where the mortgaged premises were situated; declared that the plaintiff should be deemed to hold the security *prima facie* with full notice of all equities; stayed all sales under power of sale in the mortgage, in case misrepresentation or want of consideration were alleged, until such issue should be finally determined, and deprived the plaintiff of all other remedies except those specified in the chapter. This act was held to so burden the remedy as to impair the obligation of the contract. The court said that several of the detailed provisions, taken alone, as, for example, the requirement of security for costs, would not of themselves have that effect, but that the purpose of the act was so obviously to embarrass, restrict, and postpone the enforcement of these mortgages, according to their terms, that it must be held void. Oatman *v.* Bond, 15 Wis., 20.

A law authorizing the issue of certain city bonds required the levy of a tax to meet the same. A subsequent act prohibited the
47 city from raising any taxes except for each year's interest as it accrued. Held unconstitutional so far as it prohibited a tax

to meet judgments on previously defaulted interest. State *ex rel.* Soutter *v.* Madison, 15 Wis., 30.

Suspension of all process against volunteers "during service" held to impair the obligation of the contract, because it deprived the creditor of all remedy for an indefinite period—as the court said, "five, ten, or twenty years." Hasbrouck *v.* Shipman, 16 Wis., 296. The contrary has been held in other States where the suspension was not indefinite. McCormick *v.* Rusch, 15 Ia., 127; Breitenbach *v.* Bush, 44 Pa. St., 313; Clark *v.* Martin, 49 *id.*, 299.

Statute making order of publication proof of sufficiency of grounds therefor held not constitutional as applied to pre-existing void judgments. Nelson *v.* Rountree, 23 Wis., 367.

Statute giving subcontractor's lien limited by the amount of the owner's debt to the contractor changed to make owner liable without limit held to modify the obligation of existing contract between owner and building contractor, and therefore unconstitutional. Hall *v.* Banks, 79 Wis., 229.

Statute giving debtor power to vacate the lien of an execution or attachment by making assignment within ten days thereafter; impairs obligation of existing contracts and is unconstitutional. Second Ward Savings Bank *v.* Schranck, 97 Wis., 250; Peninsular L. & C. Works *v.* Union O. & L. Co., 100 Wis., 488; Eau Claire Bank *v.* Macauley, 101 Wis., 304.

Statute prohibiting sale, under power contained in a mortgage, for less than two-thirds of an appraisal and giving one year for redemption held to impair the obligation. Bronson *v.* Kinzie, 1 How. (U. S.), 311.

Law staying execution of a judgment or enforcement of a contract impairs the obligation. Barnitz *v.* Beverly, 163 U. S., 48 118, and cases there cited.

Laws requiring that negotiable coupons from existing State bonds must before receipt for taxes be accompanied by principal bond, and that their genuineness be established without expert evidence, held to impair obligation. Production of principal bond inconsistent with contracted negotiability of separate coupons; expert evidence only way to prove genuineness of printed coupons and its exclusion worked complete repudiation. Intent to repudiate the coupons was obvious, and above provisions only parts of general scheme. McGahey *v.* Virginia, 135 U. S., 685.

In the light of the general rules on the subject and the foregoing illustrations of their application, we turn to an examination of the changes in procedure for enforcement of claims not allowed by the council, accomplished by amendment of defendant's charter. Under the former law jurisdiction of the court could be invoked by service of summons, which, if accompanied by complaint, the city must answer within twenty days, except for extension of time in discretion of court. Defects in summons or service thereof could be waived by voluntary appearance. Mistakes in procedure whereby plaintiff failed of hearing on the merits usually worked only nonsuit and he might sue again, subject only to statute of limitations. In contrast with this procedure it is pointed out that under the

charter of 1891 the plaintiff, before invoking jurisdiction of any court, must file his claim with the city clerk and must await examination by the comptroller and action of the council disallowing it, which may postpone him sixty days instead of twenty. Further, in order to reach a judicial forum he must give security for costs in a form prescribed by law and with sufficient sureties; he must obtain approval of the sureties by the city attorney and comptroller. Practically, he must do this within twenty days, appellant contends, for if a new bond be rendered necessary by a disapproval
49 that must be filed within that period from the disallowance of the claim. No method for coercing the action of these officers is expressly provided. Appellant also suggests the possible absence of either, casual or intentional, as a contingency burdening a claimant's chances of reaching the court. Lastly and most urgently, counsel dwells on the asserted inability to correct any mistakes by amendment and on the fatal effect of any such mistakes, not only on the action, but upon the cause of action as well.

Some of these changes are too immaterial to require extended comment. Service of notice of appeal on the city clerk in lieu of service of summons on the mayor is so. Nor are we impressed with the importance of the asserted inability of a claimant to cure defects in procedure by amendment. It can hardly be said that there is any vested right to make mistakes. A variance of policy as to liberality in permitting amendment cannot be said to impair the obligation of any contract. A law permitting amendment of attachment affidavit has been held valid as to existing contracts and actions (Rosenthal *v.* Wehe, *supra*), why not the converse? The fact that a failure to obtain judgment by reason of errors in procedure or lack of proof, which in ordinary practice would result only in nonsuit, leaves claimant barred of his claims, no more affects the obligation than does a statute of limitations leaving reasonable time to sue, but expiring before the defectiveness of an attempted suit is discovered. It certainly comes no nearer such obligation than does an act taking away one's right to a second trial as of course after a judgment in ejectment (Sydnor *v.* Palmer, *supra*).

Perhaps the most cogent of appellant's objections to the new procedure is that there is a period of suspension of his right to sue resulting from the requirement that he must first present his claim to the council and await its disallowance. It is by no means certain that such obstacle is a new one. It has been
50 held that the statute, secs. 79 and 80, ch. 15, R. S. 1858, requiring claims to be presented to town boards of audit before they could be paid, impliedly prohibited suit until that had been done. Putnam *v.* Rubicon, 32 Wis., 498. That statute is not very obviously distinguishable from the requirements of the Oshkosh charter of 1883, either in the procedure indicated or the legislative purpose to be accomplished. It is not, however, necessary to decide upon their identity at this time. It will be observed that while unconstitutionality has been ascribed to legislation which directly postponed the ultimate acts for enforcement of a contract right, as by staying execution or creating or extending period of redemption

from judicial sales (Barnitz *v.* Beverly, *supra*), no case has been cited to us and none discovered where reasonable delay, resulting incidentally from the requirement of certain new steps in procedure or from enlargement of time for taking such steps, has been held fatal, provided such legislation did not clearly appear to be in bad faith and for the purpose of defeating or impairing the very obligations of the contract. On the other hand, such modifications of proceedings imposing either increased burdens or increased time have been recognized as legitimate exercise of legislative power over remedies and procedure. Von Baumbach *v.* Bade, *supra;* Starkweather *v.* Hawes, *supra;* Lee *v.* Buckheit, *supra;* Relyea *v.* Tomahawk Co., *supra;* Vance *v.* Vance, *supra;* Clark *v.* Martin, *supra.* In addition to these instances, it is worthy of note that very many such enactments have been enforced without challenge, some of them since very early days, thus adding the tacit consensus of legislature, courts, and the profession to a construction of the constitution which permits them. Among such may be noted the adoption, with reference to claims against counties, of the same policy as that with reference to cities now complained of, secs. 676, 682, and 683, R. S. 1898; the postponement of suits against towns until after presentation and consideration of
51 claim, sec. 824, R. S. 1898; the stay laws for purposes of reassessments, sec. 1210*b*, R. S. 1898; Plumer *v.* County Board, 46 Wis., 141, and many others. The requirement that before invoking judicial action the claimant must submit his claim to consideration of the common council is not a serious burden upon him. In practical affairs the instances are rare, if not unknown, that a claimant commences suit until he has first invited payment without suit. The effect of the charter of 1891 is to limit, not enlarge, the period necessary to constitute a demand and refusal of payment. In the matter of demands against municipalities the importance of momentary opportunity to sue is far less than with individual debtors, who during even a few days may by transfer of property or otherwise become execution-proof and thus defeat the purpose of an action.

The only remaining obstacle to judicial hearing and enforcement which appellant urges upon our attention is the requirement of a bond for costs in the sum of $150. This is in itself hardly a new burden, for our practice statutes have since long prior to 1883 subjected plaintiffs to a security for costs in the discretion of the court in still larger amount. Independently of this view, however, the absolute requirement that a plaintiff shall furnish reasonable security for costs as prerequisite to suit cannot be considered so completely a denial of adequate remedy as to impair the obligation of existing contracts. It is a very usual requirement of practice statutes and rules. If our statutes were changed so that such a preliminary were absolutely required by law for all suits, instead of being permissibly required by the court, as now, we apprehend there could be no doubt that such change is within the legitimate control of the legislature over procedure. Such is the suggestion in Oatman *v.* Bond, *supra;* but counsel urges that the bond is

not amendable and a mistake therein is fatal to the cause of action.

The answer to this suggestion is that no mistake need
52 be made. The charter, in terms easy of comprehension if carefully read, prescribes what the bond shall be, and compliance therewith is not difficult. A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract does not impair the obligation because one straying out of the prescribed path cannot reach the goal. But again counsel says the statutory requirement that the bond be approved by the city attorney and comptroller renders it possible for those officers, either wilfully or by neglect, to exclude him from his remedy in court. Whether this be so has not yet been decided. If an appellant files a good and sufficient bond in compliance with law, it is by no means certain that the courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion. But it is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties. The duty of the city attorney and comptroller to approve a proper bond is one cast on them by law, for breach of which one injured may have his remedy, as well as against the sheriff on whom he must depend for enforcement of an execution. All remedies depend upon performance of duty by public officers, and by breach thereof may fail. That is true even of the privilege of action in the courts wherein breach of duty by the judge might most effectually postpone or entirely defeat the claim, but such possibility does not render the remedy inadequate.

That the change of legislative policy as to procedure upon claims against Oshkosh and many other cities was adopted in the utmost good faith, with no legislative purpose other than promotion of public welfare and proper protection of public funds against unlawful demands, cannot be doubted. Putnam *v.* Rubicon, *supra:* See-

gar *v.* Ashland, 101 Wis., 515. It is the duty of the courts to
53 uphold and enforce such deliberately adopted and important changes of policy, unless it appears clearly and beyond all reasonable controversy that the legislative power has been exceeded. Adams *v.* Beloit, 105 Wis., 363, 373. After careful consideration of the changes wrought by the amendment of 1891 to the Oshkosh charter, we are unable to say with the requisite certainty that the legislature has transgressed the bounds to its authority over remedies and procedure by so modifying them as to relieve the city from any obligation resting upon it by reason of the contract with plaintiff, or to so diminish the remedy as to render those obligations substantially less valuable. We therefore are bound to enforce the law as it is written and affirm the decision of the trial court in sustaining the demurrer to the complaint.

By the COURT: Judgment affirmed.

54 And afterwards, to wit, on the thirteenth day of March, A. D. 1901, the following dissenting opinion by Justice Bar-

deen was filed in said cause in the words and figures following—that is to say:

55 OSHKOSH WATER WORKS COMPANY, Appellant,
vs.
CITY OF OSHKOSH, Respondent.

BARDEEN, *J.* (dissenting):

The obligation of a contract, in a constitutional sense, is the means provided by law by which it can be enforced. Whatever lessens the efficacy of this means or tends to postpone or retard the enforcement of the contract, impairs the obligation. State of Louisiana, &c., *v.* New Orleans, 12 Otto, 203; S. C., Lawyers' Co. Op. Ed. Book 26, p. 132, and note; vol. 9, Notes on U. S. Rep'ts, 1069; Baker's Ann. Cons. U. S., 68. The remedies afforded by existing laws enter into and form a part of the obligation of a contract. The legislature has a right to change such remedies and modify the laws governing procedure in court if it leaves the party a substantial remedy according to the course of justice as it existed at the time the contract was made. Sturges *v.* Crowninshield, 4 Wheat., 122. One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not a question of degree or manner or cause, but of incroaching in any respect on its obligation, dispensing with any part of its force. Planters' Bank *v.* Sharp, 6 How., 301. The substantial question in this case is whether the new charter so affects the remedy as to impair the obligation of plaintiff's contract and render it less valuable. I cannot persuade myself that it does not. The conditions and restrictions thrown around the attempt to get into court are so complex and indefinite, and are to be followed with such nicety of exactness at the peril of losing the remedy entirely, and are so completely different from those in existence when the contract was made, that in my opinion they so lessen the efficacy of the remedy, retard its enforcement, and
56 diminish its value as to come within the condemnation of the Constitution. I refer particularly to those charter provisions relating to the time when an appeal must be taken commences to run, and the requirements relating to the giving and approval of a bond. The latter provisions seem to me to be of especial significance. The appellant must take its appeal, get its bond, and secure the approval both of the city attorney and city comptroller in twenty days or its rights are forfeited. The charter contains no provisions regarding the responsibility of the sureties, does not say what the appellant must do to satisfy the city attorney and comptroller as to the sufficiency of the bond, but leaves it entirely to those officers to approve or not, at will. If perchance one of those officers should be absent from the city during the time the right to appeal is running, the appeal is lost. The old charter contained no such technical or drastic conditions. There are several other changes which, to my mind, tend to lessen the value of the contract and to postpone and retard its enforcement, but I need not mention them at length. The impression in this regard is so strong that I cannot agree with the conclusion of the majority of the court.

57 OSHKOSH WATER WORKS COMPANY, Plaintiff in Error,
vs.
CITY OF OSHKOSH, Defendant in Error.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause.

That the original writ of error, the petition therefor, the citation, with its service endorsed thereon; the assignment of errors, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

Seal Supreme Court of Wisconsin.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this thirtieth day of March, A. D. 1901.

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No., 18,101. Wisconsin supreme court. Term No., 288. The Oshkosh Water Works Company, plaintiff in error, *vs.* The City of Oshkosh. Filed April 3rd, 1901.